MOTION FILED
MAY 26 1981

No. 80-931

In the Supreme Court of the United States

October Term, 1980

CHARLES D. BONANNO LINEN SERVICE, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

TEAMSTERS LOCAL UNION NO. 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA, BERKELEY LINCOLN MERCURY, INC., for leave to file brief

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AMICUS CURIAE

Pursuant to Rule 42 (3) of the Rules of this Court, Golden Bear Motors, Inc., d/b/a Golden Bear Ford, Gil Ashcom Toyota, Berkeley Lincoln Mercury, Inc., move the court for leave to file a brief amicus curiae

in the above entitled case. Counsel for Petitioner, Bonanno, replied affirmatively to movant's letter of April 29, 1981. A confirming letter has been received and is attached as Exhibit A.

The Solicitor General replied affirmatively to movant's letter of April 29, 1981, and a confirming letter is attached as Exhibit B. Counsel for Intervenor, Teamsters Local Union No. 25, failed to respond to movant's letter of April 29, 1981.

INTEREST OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA & BERKELEY LINCOLN MERCURY.

The question presented in the instant case is a matter of continuing importance to movants. Briefly stated, the question is: does an "impasse" in negotiations constitute an unusual circumstance permitting withdrawal by an employer from multi-employer bargaining?

Multi-employer groups vary greatly in size, type of industry and in the strengths of various member employers. The interest of movants is predicated on the substantial and far reaching consequences that any decision here may have on such a highly diverse and rapidly changing industry as new car sales in contract negotiations, thereby becoming obligated to an agreement and a method of negotiations not suited to individual needs. For these reasons movants request this opportunity to present their views.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *Amicus* brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

RALPH B. HOYT
of HOYT & GOFORTH
Counsel for:
Golden Bear Ford, Gil Ashcom Toyota, and Berkeley Lincoln Mercury

BRIEF OF GOLDEN BEAR MOTORS, INC., d/b/a GOLDEN BEAR FORD, GIL ASHCOM TOYOTA & BERKELEY LINCOLN MERCURY

INTEREST OF AMICUS CURAIE

The interest of Amicus Curiae is set out in the Motion for Leave to File supra.

THE QUESTION PRESENTED

Whether an impasse reached in negotiations enables an employer to unilaterally withdraw from a multi-employer bargaining unit and thereafter negotiate with the union on an individual basis.

ARGUMENT

An impasse in negotiations justifies withdrawal from a multi-employer bargaining unit.

A. INTRODUCTION

The court below found it impermissible for Charles D. Bonanno Linen Service to withdraw from multi-employer bargaining upon the occurrence of impasse in negotiations.

The court will be called upon to examine the right of withdrawal from a multi-employer bargaining unit. An opportunity is afforded the Court to resolve a conflict between the competing bargaining strengths of the employers and the union in multi-employer bargaining.

B. THE OCCURRENCE OF AN IMPASSE IN NEGOTIATIONS JUSTIFIES WITHDRAWAL FROM A MULTI-EMPLOYER UNIT

1. The Court below in deciding against the employer relied heavily on what it perceived to be the public and private interests served by multi-employer bargaining.

The Court below listed the following as interests served by such bargaining:

1. It enables smaller employers to bargain on an equal basis with larger employers;

2. It facilitates development of benefit programs;

3. It encourages a more flexible attitude in bargaining as both sides can make concessions without the fear that by doing so they will become less competitive or that in the case of the union, it's members will be dissatisfied in not having received the same benefits as won from other employers; and

4. Multi-employer bargaining reduces industrial strife.

The Court below fails both to address the flaws of multi-employer bargaining and to recognize the realities of the situation.

To begin, multi-employer bargaining was a product of its times. It permitted weaker employers to join together to bargain with stronger unions. Multi-employer bargaining enjoyed its greatest popularity

approximately forty years ago. Since that time its popularity has faded as times changed. Small employers today can sign what is commonly known as a "subscriber's agreement" to the industry contract. Therefore, they no longer have to fear being forced into a less competitive contract than other employers; further, with the inception of the concept of a subscriber's agreement, small employers need not expend time or money to negotiate a contract with a union unless they so desire. Thus, the argument of the Court below that multi-employer bargaining enables small employers to bargain on an equality basis with larger employers is incorrect and not reflective of today's practice of labor law.

The further argument of the Court in favor of protecting the sanctity of multi-employer bargaining is it assists in developing benefit programs. This argument also does not address reality. It was true that thirty to forty years ago benefit programs for employees were not plentiful. However, the last twenty years has seen the growth of an aggressive insurance industry providing many and varied health and pension programs for employees. These private insurance companies often tailor benefit programs to fit the individual employer making them more affordable than union plans which do not have to be concerned with cost competitiveness with other plans.

The Court below also found that multi-employer bargaining fosters a more flexible attitude in nego-

tiations so that greater concessions can be made without fear of being less competitive or that union members will be dissatisfied because they do not have the same benefits as members employed elsewhere.

With regards to employer fears of loss of competitiveness, it is antithical to the free enterprise system to have uniform wages and benefits. Such uniformity in monetary concerns forms collusion against the consumer and is anti-competitive.

The concern that unequal salaries and benefits among employers will cause employee dissatisfaction against their union is specious. A union should not need the assistance of the government to have satisfied members. A union should be viewed like any other business providing a service. If the service isn't satisfactory to its members, then other means of redress rather than governmental favoritism of multi-employer bargaining, is appropriate.

The final interest the Court below felt was served by multi-employer bargaining was a decrease in industrial strife. The court below reasoned that because employers are negotiating together if there is a strike there will be only one rather than several.

Again the court failed to grasp reality. Rather than a strike against one or a small number of employers you have a strike against *all* employers in an industry, virtually paralyzing it. Instead of a minor incovenience to the public in having, as example, a

handful of grocery stores struck, you have all the stores struck creating a major shortage. Or as happened in the airline industry, instead of one or two airlines being struck, all domestic carriers were struck leaving many thousands of passengers stranded. The result of just such a strike in the airline industry was the abandoning of multi-employer bargaining for individual bargaining.

If impasse is not recognized as an unusual circumstance by this court, the result may very well be the same. Leaving multi-employer bargaining in the eyes of employers as an unsatisfactory method of negotiations because of the unequal bargaining strengths given to the parties.

2. There is no practical difference between an interim and a final agreement.

The Court below ruled that impasse is not sufficient justification to permit employer withdrawal. The argument of the employer and the rational of numerous appellate courts in permitting withdrawal following an impasse was that the union would be given an unfair advantage at any time during the negotiations by strategically selecting employer bargaining unit members with whom to negotiate a final agreement, thus weakening and fragmenting the employer unit. The union, and rightly so, was perceived to have an unfair advantage based on greater bargaining strength. It was thus determined by several courts that the arsenal of economic weapons afforded the

parties must be equaled and ruled that the employer would be granted another economic weapon namely, the ability to withdraw from the unit following impasse.[1]

The National Labor Relations Board has subsequently rethought its position regarding a union's ability to negotiate individual contracts with member employers. The Board now holds to the premise that with regards to unusual circumstances which justify withdrawal from multi-employer bargaining it will distinguish between tactics "which contemplate adherence to a final unit-wide contract and are thus not antithetical to group bargaining and [those] which are clearly inconsistent with, and destructive of group bargaining."[2] In other words, interim contracts are permissible but final contracts are not.

But, in actual terms, is there any difference in the practical effect they have on a multi-employer unit? It is the position of the employers herein that there is no difference. No mater what type of bargain is struck, interim or final, the effect is the same; the bargaining unit is fragmented.

The union still has the decided benefit of being able to determine when and whom it will negotiate a

[1] *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir. 1975), cert. denied, 423 U.S. 893; *NLRB* v. *Independent Association of Steel Fabricators*, 582 F.2d 475 (3rd Cir. 1978); *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3rd Cir. 1975); *NLRB* v. *Highway Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974; *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170 (8th Cir. 1972).

[2] *Joseph D. Bonanno Linen, Inc.*, 102 LRRM at 1004.

side agreement with, thus relieving that employer from the threat of economic action and placing a greater burden on the remaining employer members who, if struck, will stand by and watch their competitor continue unhindered in business because they had the good fortune of being chosen by the union to be the beneficiary of any interim agreement.

The most cogent analysis of the problem is found in *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3rd Cir.) wherein it was decided that impasse standing alone, constituted "unusual circumstances" within the meaning of *Retail Associates*, (120 NLRB 388 (1958)).

The Court in *Beck Engraving*, supra, citing *NLRB* v. *Truck Drivers Local 499*, (353 U.S. 87 (1957), [Buffalo Linen]) recognized that multi-employer bargaining contributes to labor stability and realized that "the ultimate problem is the balancing of the conflicting legitimate interests." *Buffalo Linen*, supra.

The Court further noted that in the *Evening News Association* (154 NLRB 1484 (1965) enf'd 372 F.2d 569 [6th Cir. 1967]), ibid, "the Board espoused the tenet that identical principles regarding multi-employer bargaining and withdrawals *will be applied equally* to the union and the individual employers." *Beck*, supra, (emphasis added). The Court found further that the "even-handed principle" or parity principle, had been followed by the Board in substan-

tially all of its decisions in applying the *Retail Associates* rule to the union as well as the employer, but the Court noted with disapproval that the Board had strayed from and seemingly abandoned this principle by giving "its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit," *Beck*, supra. The immediate impact of this policy was to give an undue and unnecessary advantage to the union by strengthening the union's hand vis-a-vis those employers remaining with the multi-employer bargaining unit. By allowing the union two economic weapons (strike and interim agreements) while allowing the employers only one (the lockout) the Board had tipped the balance of equality in favor of the unions, giving them an unfair advantage in negotiations.

Based on the above arguments, the *Beck* Court found that an impasse reached during good faith negotiations is indeed an "unusual circumstance" permitting unilateral withdrawal by both sides.

The Labor Board argues that its reconsideration of *Charles D. Bonanno*, 243 NLRB No. 140, 102 LRRM 1003 (1979) should be adopted as it fosters labor stability.

In its reconsideration of the *Bonanno* decision, supra, the Board makes a distinction between "interim agreements" and "final agreements," reasoning that the former do not fragment the unit while the latter

do. The Board acknowledges however, that under either type of agreement the remaining employers in the multi-employer bargaining unit can be "whipsawed," "however, [such tactics] are part and parcel of multi-employer bargaining," and should not be taken to equate their use with rejection of the multi-employer unit and "is not inconsistent with an overall agreement." The Labor Board has failed to in any way explain why such agreements, whether interim or not, do not fragmentize the unit and what should be the result if they do. More importantly, the Labor Board has not squarely addresssed the *Beck* Court's concern about the failure of the Board to continue to adhere to its parity principle as stated in *Evening News Association*, supra. The NLRB attempts to answer this concern by stating first that economic weapons should not be counted nor measured then attempts to argue that the employers remaining in the multi-employer unit "have many economic weapons" yet names only one, the lock-out.

Finally, the Board's distinction between entering into final agreements fails totally to answer the *Beck* Court's argument in permitting impasse as an unusual circumstance, specifically, why the union's right should accrue first and why there shouldn't be parity in the number of economic weapons open to either party.

The *Beck* Court in unusually strong language and in very clear reasoning stated:

> The employer's right to withdraw during a bargaining impasse *cannot be made contingent upon the union's prior exercise of its right* to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse). Were the rule otherwise, the parties whose right accrues first would be given a tremendous bargaining advantage and leverage. We recognize that to some extent, basing the right of withdrawal upon the existence of an impasse rather than of individual negotiations, contributes to instability within the context of multi-employer bargaining. Certainly, that is the result in this case. But we cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at the stabilization of these units, is a necessary concomitant of ensuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party, (emphasis added) *Beck Engraving* 90 LRRM 2089 and 2095.

The NLRB argues that an impasse can be manipulated by one of the parties simply by taking an extreme position. While this may be the case in some situations, it should be noted that such gerrymandering can be manufactured by *either* party, not just one as exists under the Board's "final agreement" theory. Thus one party is not given an advantage over another. Additionally, such an occurrence can presum-

ably be remedied by filing an unfair labor practice charge and if need be, by such expedient remedies as a 10(J) injunction. Further, by hinging withdrawal of either party on a good faith impasse, the desire to reach an agreement, knowing that withdrawal and/or individual agreements might occur at said impasse, may promote more vigorous and realistic bargaining on both sides similar to that found in "last best-offer" bargaining in the public sector.

Finally, the Second Circuit in *NLRB* v. *Association of Steel Fabricators* (582) F2d 135 2nd Cir. 1978) 99 LRRM 3150 adopted the *Beck* rationale stating:

> ". . . The objectives of collective bargaining would be ill-served by compelling employers to remain in the bargaining unit once it becomes clear that no progress is being made within that framework." *Steel Fabricators*, supra, at 3157.

The *Steel Fabricators*' arguments that bargaining is ill-served by compelling employers to remain in the bargaining unit once an impasse is reached is equally applicable to unions and follows the Board's enunciated policy that it will not require the parties to engage in fruitless bargaining sessions.

CONCLUSION

For the reasons enumerated in the *Beck Engraving* decision, this Court should continue to adhere to the concepts of parity. The Board's position, in its *Bonanno* reconsideration, is so blatantly unfair, contrived

and machinistic, it should be rejected on its face. In the place of this contrived policy, the *Beck* rationale of good faith impasse with all of the protections the Board has available to ensure good faith, should be adopted. This is the only reasoning that does not offer one side a greater advantage over the other. By allowing the union to decide if it is strategically beneficial to them to engage in interim agreements and to decide which employer(s), weak or strong, it will negotiate with on a separate basis so as to effectuate the greatest weakness in the employer's unit, promotes what the Labor Board attempts to avoid, fragmentation of the unit.

Withdrawal from multi-employer bargaining for either the employer or the union should be limited:

1. prior to the time for commencement of negotiations,

2. in the face of severe individual financial crisis,

3. or impasse.

Should the Court affirm the *Bonanno* decision from the Court below, the death knell for multi-employer bargaining may very well be sounded. The continued viability of such bargaining will be predicated on whether or not it can serve the needs of both the union and the employer members. If employers perceive that contracts could be negotiated that otherwise would not be the case because the union is given greater

bargaining strength, the attractiveness of group negotiations will be lost and, as was the case with the airline industry, multi-employer groups will cease to exist.

Dated: May 22, 1981.

HOYT & GOFORTH
By: RALPH B. HOYT
Attorney for Golden Bear Motors, Gil Ashcom Toyota and Berkely Lincoln Mercury

PROOF OF SERVICE BY MAIL—CCP 1013a, 2015.5

I declare that:

I am (a resident of/employed in) the county of Contra Costa, California. I am over the age of eighteen years and not a party to the within cause; my business/ residence) address is: 1910 Olympic Blvd., Suite 220, Walnut Creek, California 94596. On May 21, 1981, I served the within Amicus Curiae Brief on the Parties Entitled in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Walnut Creek addressed as follows:

SIDNEY A. COVEN
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HARRISON COMBS
General Counsel
United Mine Workers of America
900 Fifteenth Street, N.W.
Washington, D.C. 20005

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 11, 1981, at Walnut Creek, California.

CHEROLYN J. ADAMS

APPENDIX

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AREA CODE 617
523-6240

RECEIVED
MAY 21 1981
RALPH B. HOYT

May 18, 1981

Marcia Hoyt, Esquire
Hoyt & Goforth
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Walnut Creek, CA 94596

Re: Charles D. Bonanno
Linen Service, Inc.
v. NLRB, Case No.
80-931

Dear Ms. Hoyt:

Pursuant to your letter of April 29, 1981, and our subsequent conversation, please be advised that the petitioner in the above-captioned matter consents to the filing of an Amicus Curiae Brief in the above case as requested by your letter.

For your information the National Labor Relations Board is represented by the Solicitor General of the United States, Wade H. McCree, Jr., Department of Justice, Washington, D. C. 20530 and by William A. Lubbers, General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W. Washington D. C. 20570. Respondent Union is represented by James T. Grady, Grady & McDonald, 75 Federal Street, Boston, Massachusetts 02110.

Very truly yours,

Howard I. Wilgoren

HIW:ss

Exhibit A

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

May 7, 1981

Marcia H. Hoyt, Esq.
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RECEIVED
MAY 11 1981
RALPH B. HOYT

Re: Charles D. Bonnano Linen Service, Inc. v. NLRB, et al., No. 80-931

Dear Ms. Hoyt:

As requested in your letter of April 29, 1981, I hereby consent to the filing of a brief amicus curiae on behalf of Golden Bear Motors, Inc.; Toyota of Berkeley, Inc.; and Berkeley Lincoln Mercury, Inc.

Also, as requested in your letter, I am enclosing a list with the names and addresses of counsel for the employer and the union in the above-referenced case.

Sincerely yours,

Wade H. McCree, Jr.

Wade H. McCree, Jr.
Solicitor General

Enclosure

Exhibit B